No. 15-339

In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AND HUMAN RIGHTS DEFENSE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LANCE WEBER
HUMAN RIGHTS DEFENSE CENTER
1013 Lucerne Avenue
2nd Floor
Lake Worth, FL 33460
(561) 360-2523

CHRISTOPHER WIMMER
Counsel of Record
EMERGENT
535 Mission Street
14th Floor
San Francisco, CA 94105
(415) 894-9284
chris@emergent.law

Counsel for Amici Curiae

Becker Gallagher Cincinnati, OH Washington, D.C 800.890.5001

CORPORATE DISCLOSURE STATEMENT

The National Police Accountability Project and Human Rights Defense Center are nonprofit organizations that have no parent company and do not issue stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit public interest organizations dedicated to protecting the rights of individuals held in all types of detention facilities in the United States.

The **National Police Accountability Project** ("NPAP") is a nonprofit organization founded by members of the National Lawyers Guild. Members of NPAP represent plaintiffs in police misconduct and prison condition cases, and NPAP often presents the views of victims of civil rights violations through *amicus* filings in cases raising issues that transcend the interests of the parties before the Court. NPAP has more than five hundred attorney members throughout the United States.

The **Human Rights Defense Center** ("HRDC") is a nonprofit charitable corporation that advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing Prison Legal News, a monthly publication that covers criminal justice-related news and litigation nationwide, publishing and distributing self-help reference books

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[1] Counsel for the *amici* provided counsel of record for petitioner and respondent written notice of the intent to file this brief under Supreme Court Rule 37.2(a). Both consented, and record of those consents has been lodged with the Court. In addition, no counsel for any party authored any part of this brief, and no party or counsel to a party made a monetary contribution intended to fund the preparation or submission of the brief.

for prisoners, and engaging in litigation in state and federal courts on issues concerning detainees.

SUMMARY OF ARGUMENT

Petitioner advances a novel interpretation of the Prison Litigation Reform Act's ("PLRA") requirement that inmates exhaust only those administrative remedies that are "available." "[A] prisoner's misunderstanding of the prison's grievance process – reasonable or otherwise – cannot render the process unavailable." Pet. 34. Besides being inconsistent with the law in every circuit to have considered the issue (Resp. 36-40), petitioner's rule would bar judicial review of important claims, would not serve the purpose of the PLRA, and would land hardest on the nation's most vulnerable prisoners. The Court should affirm the ruling below, and definitively establish that prisoners who make objectively reasonable mistakes in the grievance process are not precluded from having their cases heard on the merits.

ARGUMENT

I. Prisoners With Serious Claims Make Objectively Reasonable Errors

The petitioner's proposed rule is bad policy, because it would deny judicial review to inmates with serious claims of harm who trip over institutional grievance rules, no matter how objectively reasonable their error.

There are many stones on which to stumble—"single issue" rules, which require inmates to address only one grievance per complaint; numerical limits on grievances, which can be at cross purposes with the "single issue" rule; time limits as short as a

few days; exacting rules about completing forms; multiple layers of required internal appeals—and they thwart many prisoners.

For example, in *McMiller v. Jones*, 590 Fed. App'x 749 (10th Cir. 2014) cert. denied sub nom. *McMiller v. Patton*, 135 S. Ct. 1559 (2015), an African-American inmate was attacked with a razor blade by his cellmate, who had previously stabbed one African-American and told prison officials "that he would not live with an African American inmate" and "that there would be trouble" if he was put in a cell with one. The injured inmate submitted a grievance form the next day, and when he did not receive a response within two weeks, submitted a "no response" grievance. 10 days later, the prison rejected the "no response" grievance for failure to attach the initial grievance. Within a week, the inmate submitted a grievance attempting to address these shortcomings—but it too was rejected, because it was deemed a new grievance (and so untimely), rather than a corrected grievance (which would have been timely). 590 Fed. App'x at 750, 751-52, 754.

In *Ajala v. Tom*, 592 Fed. App'x 526 (7th Cir. 2015), an inmate suffered permanent nerve damage from handcuffs that were overtightened and left on him for four hours. First, he attempted to file two grievances, but they were rejected as addressing multiple issues. The next week, he attempted to file three grievances—the first two addressing the rejection of the prior week's complaints, the third regarding the handcuffs. The last was rejected for exceeding the prison's limit of two grievances per week. The prisoner resubmitted it in the new week, but it was rejected as

untimely, because the prison required all grievances to be filed within 14 days of the incident. 592 Fed. App'x at 526-27

In *Porter v. Sturm*, 781 F.3d 448 (8th Cir. 2015), an inmate was falsely accused of threatening to send anthrax to the governor. An investigation absolved him, but after he filed an unrelated section 1983 action the prison manager repeated the accusation. This led to a disciplinary hearing where the inmate was found guilty on the manager's word alone, and without consideration of the prior investigation; he was placed in segregation. Although a second hearing cleared him again, he was kept in segregation. The inmate filed a grievance complaining that he was being targeted in retaliation for his 1983 claim, which the warden should have (under prison regulations) responded to within 40 days. When 80 days had passed without a response, the inmate requested an appeal form. The state department of corrections sent him one, along with a letter questioning the need for an appeal and counseling that he should "be patient" for the warden to respond. The inmate promptly appealed this failure to respond substantively, but never received a response. Eventually, more than 14 months after the inmate had submitted his grievance, the warden finally responded. Apparently concluding that the process had run its course, the inmate accepted the warden's decision and filed suit—and then was found not to have exhausted his administrative remedies, because the court concluded his appeal of the failure to respond to his grievance was not an appeal of the warden's late response. 781 F.3d at 449-51.

These are not outliers. *See, e.g.*, *Pavao v. Sims*, No. 5:13CV233-WS, 2015 WL 1458161 (N.D. Fla. Mar. 30, 2015) (grievances of inmate punched and kicked into unconsciousness by cellmate after guard accused him of being a "child molester" and "F.B.I. confidential source" repeatedly rejected because he wrote on the back of the grievance forms instead of on attachment pages); *Estrada v. White*, No. 2:14-CV-149, 2015 WL 2452388 (S.D. Tex. May 21, 2015) (jail argued prisoner beaten by officer had not engaged in three-step informal resolution, although the jail handbook did not mention it; jail was operating "two grievance procedures with conflicting provisions"); *Johnson v. Patel*, No. CV 14-1598-RGK KK, 2015 WL 3866226 (C.D. Cal. June 18, 2015) (prison argued inmate whose colon was badly damaged during botched operation had failed to exhaust because he submitted with his internal appeal new grievance forms instead of his original forms, even though the original forms had been rejected for including attachment sheets); *Amador v. Andrews*, 655 F.3d 89, 102 (2d Cir. 2011) (female inmate who complained of sexual assault to New York inspector general had failed to exhaust, even though inmates were told to "[w]rite to the Inspector General if you feel more comfortable going directly outside the facility," because her complaint also raised systemic issues subject to the grievance procedure).

However the Court judges the objective reasonableness of the inmates in these particular examples, they show beyond peradventure that inmates with serious complaints can be thwarted by the mechanics of the grievance process, making the prevailing standard for "availability"—a prison administrative remedy is available only if an

objectively reasonable prisoner would know which remedy to use and how to use it (Resp. 12)—an important backstop to ensure that inmates who make reasonable mistakes about these sometimes byzantine, sometimes misapplied procedures do not lose their access to judicial review.

II. An Objectively Reasonable Error Standard Best Promotes the Purpose of the PLRA

The petitioner's proposed rule is also inconsistent with the goals of the PLRA. The purpose of the Act is to "reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. 516, 524 (2002), and the exhaustion requirement serves that purpose by "allow[ing] prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court," *Jones v. Bock*, 549 U.S. 199, 204 (2007), which can result in "corrective action taken in response to an inmate's grievance [that] might improve prison administration and satisfy the inmate, thereby obviating the need for litigation," might "filter out some frivolous claims," and facilitates adjudication of those cases which are brought in federal court "by an administrative record that clarifies the contours of the controversy," *Porter v. Nussle*, 534 U.S. 516, 525 (2002) (citations omitted).

The prevailing rule allowing inmates to pursue claims in federal court despite objectively reasonable errors during the grievance process best promotes the purpose of the PLRA in general and the exhaustion requirement in particular for several reasons.

First, it creates incentives to improve grievance systems by placing the risk of confusing procedures on those who are best able to fix them: the institutions that devise those procedures. If inmates who make objectively reasonable errors about grievance rules may still pursue claims in federal court, then senior prison staff and state and local officials stand to benefit from identifying the mistakes prisoners make and improving their explanations of the rules or the operation of the rules themselves. By contrast, if the rule petitioner advances were adopted, anything short of active interference with an inmate's attempt to assert a grievance would be insulated from judicial review, and prison officials would have less reason to make sure the procedures are functional and comprehensible, because the risk of a mistake would be on the prisoner.

There is anecdotal evidence that these incentives work in practice. In *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), an Illinois prisoner filed two grievances complaining of sexual assault and retaliation. The district court found he had failed to exhaust, and the inmate appealed. The Seventh Circuit reversed, rejecting the prison's argument that the inmate had not provided sufficiently complete grievances, because neither state law nor institutional rules prescribed "the contents of a grievance or the necessary degree of factual particularity," and concluding that "[w]hen the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." *Strong*, 297 F.3d at 650. Within six months, the state's department of corrections had proposed amendments to the administrative code to fill this gap. *See* 20 Ill. Admin. Code § 504.810(b) ("The grievance shall contain factual

details regarding each aspect of the offender's complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint."); *see generally* Antonieta Pimienta, Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the "Object Intelligibly" Standard, 114 Colum. L. Rev. 1209, 1245 (2014) (recounting this history).

Second, by encouraging prisons to create grievance systems that prisoners can navigate, the prevailing rule decreases the likelihood that a prisoner will resort to federal court litigation. If prisoners understand how to put their complaints before the right person within their institution, there is a greater opportunity for the prison to resolve those individual complaints. Resolving legitimate inmate complaints reduces lawsuits. *See Jones v. Bock*, 549 U.S. 199, 219 (2007) ("We have identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved "). Additionally, prisoners who perceive that they have been treated fairly—because they understand the grievance process and were able to surmount procedural roadblocks—are less likely to take issue with the outcome, and so less likely to pursue judicial relief. *See* Am. Corr. Ass'n, Riots and Disturbances in Correctional Institutions at 11-12 (1981) ("Prompt and positive handling of inmates' complaints and grievances is essential in maintaining good morale. A firm 'no' answer can be as effective as granting a request in reducing an individual inmate's tensions, particularly if he feels the problem has been given genuine consideration by

appropriate officials and if given a reason for the denial.").

Improvements in grievance systems inspired by these incentives redound to the benefit of the institution as a whole. An effective grievance system "can provide a willing administrator with an invaluable tool for obtaining control over a system, an institution, or a program by making sure he/she has sufficient information to understand and direct it." J. Michael Keating, Prison Grievance Mechanisms Manual, U.S. Dep't of Justice, Law Enforcement Assistance Administration, at 18 (1977). The American Correctional Association has identified an effective grievance system as a key tool to head off prison violence. "A most dangerous situation arises when inmates have grievances they feel can be corrected if only the proper officials are made aware of their problems. Inmates know that disturbances are certain to give their complaints wide publicity when less drastic measures fail." Am. Corr. Ass'n, *supra*, at 11-12. To be effective, however, a system must be "used," be "perceived by inmates and line staff to be fair," and "[a]ctually solve[] problems." Keating, *supra*, at 2. When an inmate does not get his grievance heard because he has made a reasonable mistake about the procedures, the system is not used to any effect, will not be seen as fair, and does not solve problems.

III. Adopting the Petitioner's Proposed Rule Would Prevent the Most Vulnerable Individuals from Pursuing Claims

The Court should also reject the petitioner's proposal to create a new, "no mistake" rule because it would prevent the most vulnerable prisoners—who are also the most likely to make procedural mistakes when asserting grievances—from ever obtaining review of their claims.

People with mental illness are overrepresented in prisons. While an estimated 5 percent of the American population is estimated to have a serious mental illness, studies suggest that between 11 and 19 percent of prisoners do. *See* Seth Jacob Prins & Laura Draper, Improving Outcomes for People with Mental Illnesses under Community Corrections Supervision, Council of State Governments Justice Center, at 11 (2009); U.S. Dep't of Justice, Bureau of Justice Statistics, Mental Health Treatment of Inmates and Probationers, at 2 (1999) ("BJS 1999"). Those with mental illness also spend more time in prison than those without. Studies have found, for example, that in Florida's Orange County Jail, the average stay for all inmates was 26 days; for mentally ill inmates, 51 days. In New York's Rikers Island Jail, the average stay for all inmates was 42 days; for mentally ill inmates, 215 days. Treatment Advocacy Center, The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey, at 14 (April 8, 2014).

Longer prison stays mean more opportunities for legitimate grievances to arise, and the intellectual disorganization that characterizes much mental illness means that these prisoners are more likely to struggle

to follow procedural rules when trying to address those grievances. *Cf.* BJS 1999 at 9 (mentally ill are more likely to be punished for rule violations). The petitioner's suggested standard would show these citizens no mercy, no matter how objectively reasonable their mistake or meritorious their claims.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

CHRISTOPHER WIMMER
Counsel of Record
EMERGENT
535 Mission Street, 14th Floor
San Francisco, CA 94105
(415) 894-9284
chris@emergent.law

LANCE WEBER
HUMAN RIGHTS DEFENSE CENTER
1013 Lucerne Avenue, 2nd Floor
Lake Worth, FL 33460
(561) 360-2523

Counsel for Amici Curiae